(2)

No. 91-1149

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CECIL G. NOBLE - - - - - Petitioner

versus

NATIONAL MINES CORPORATION - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JEFF A. WOODS
(Counsel of Record)
KAREN J. GREENWELL
WYATT, TARRANT & COMBS
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

PAUL C. COMBS
COMBS & STEVENS
38 N. Lake Drive
P.O. Box 189
Prestonsburg, Kentucky 41653-0189
Counsel for Respondent

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 2251, LOUISVILLE, KY.

RULE 29.1 LIST

National Mines Corporation is owned by National Steel Corporation. National Steel Corporation is owned by National Intergroup, Inc. and NKK. BHP-Utah International, Inc. has assumed some potential liability for the Petitioner's claims through an indemnity agreement. BHP-Utah International, Inc. is owned by The Broken Hill Proprietary Company, Ltd.

STATUTES INVOLVED

56.190. What lands may be appropriated—Effect of previous entry, survey or patent. — (1) Only vacant lands may be appropriated under KRS 56.200 to 56.240. Land that has been escheated to the state, or has been forfeited for failure to list it for taxation or for nonpayment of taxes, or has been legally and validly patented before, is not vacant land.

(2) Every entry, survey, or patent is void insofar as it embraces land previously entered, surveyed, or patented, unless the previous entry, survey, or patent itself is void; in which case the first subsequent lawful entry, survey, or patent, whether issued before, on, or after June 13, 1944, shall be valid and be accorded the same force and effect it would have been entitled to have been accorded, had the void entry, survey, or patent never been issued.

411.120 Action to quiet title; court order if title proved

Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such release to the plaintiff, in which case the plaintiff shall pay the defendant's costs, unless for special reasons the court decrees otherwise respecting the costs.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
RULE 29.1 LIST	i
STATUTES INVOLVED	ii
COUNTERSTATEMENT OF THE CASE	1–4
REASONS FOR DENYING THE PETITION	4–5
I. This Case Involves Only Well-Settled Kentucky Property Law and Review Would Affect Only These Parties	4–5
II. The Special Master, the District Court, and The Court of Appeals All Correctly Interpreted and Applied Kentucky Case Law In Rejecting Noble's Claim	5–7
A. Noble Never Met His Burden Of Proof	5–6
B. The Tevis Chain Does Not Aid Noble	6–7
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

	PAGE
Stewart Lumber Co. v. *Fields*, 445 S.W.2d 140 (Ky. 1969)	5
McGiboney v. *Newman*, 277 Ky. 835, 127 S.W.2d 860 (Ky. 1939)	6
Flinn v. *Blakeman*, 245 Ky. 416, 71 S.W.2d 961 (Ky. 1934)	7

Statutes:

K.R.S. 411.120	1
KRS 56.190	2

Miscellaneous:

Supreme Court Rule 10.1	4

No. 91-1149

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CECIL G. NOBLE - - - - - - - *Petitioner*

v.

NATIONAL MINES CORPORATION - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, National Mines Corporation ("National"), respectfully requests the Court to deny the Petition of Cecil Gary Noble ("Noble") for Writ of Certiorari. Noble's Petition is based on a claim that the Court of Appeals for the Sixth Circuit misinterpreted or misapplied Kentucky law relating to the ownership of real property. It implicates no federal statutes or constitutional issues. It does not involve any issues of national importance, and review by this Court would affect only Noble and National. There is no special or important reason for review by this Court.

COUNTERSTATEMENT OF THE CASE

Noble claims title to two tracts of land in mountainous Eastern Kentucky. The title dispute centers on the location, validity, and priority of a number of land patents

issued by the Commonwealth of Kentucky to the parties' predecessors in interest in the 1800's. Noble initially sued to quiet the title he claimed through two land patents issued in the 1890's and called the "Totten Patents".[1] National defended claiming title through several 1867 "Amyx Patents" and the 1872 "Reid Patent".[2]

Since 1792, Kentucky's statutes have allowed only vacant and unappropriated land to be patented. KRS 56.190. An earlier patent invalidates a later patent issued for the same property. The Totten Patents through which Noble claims are invalid because they embrace only previously-patented land. Noble's chain of title is thus invalid because it does not begin with a valid patent. This was the determination of both the Special Master and the District Court Judge who independently reviewed the evidence in this case. It was also the determination of the Court of Appeals for the Sixth Circuit.

Prior to the District Court's most recent rejection of Noble's claims (affirmed by the Sixth Circuit), the District Court had twice before denied his claim of title. The district Court first ruled two weak links in Noble's chain of title invalidated it, without regard to the validity or location of the Amyx and Reid Patents. The Court of Appeals remanded, reopening the evidence to allow Noble to supplement proof of his title chain.

With Noble's additional evidence in the record, the District Court once again found Noble's chain of title defective,

---

[1]Noble decries the failure of the courts below to establish title in himself, National or someone else. Kentucky's quiet title statute, KRS 411.120, permits the adjudication of *only* the plaintiff's title claim and does not authorize a comprehensive determination of title.

[2]National is a lessee of minerals, and its claim and proof of title related to the title of National's lessor.

this time because of an invalid partnership deed. Once again, the placement and validity of the Amyx and Reid Patents were not an issue. The Sixth Circuit held the partnership deed valid as to third parties, and ruled Noble's chain of title did not fail as a threshold matter. However, the Sixth Circuit specifically placed on Noble the burden of proving his title, and said that if he could not, National's title to the property through the Reid and Amyx Patents would not be an issue. The Sixth Circuit remanded the case a second time for the taking of evidence regarding the location of all of the patents since that would affect the validity of the Totten Patents anchoring Noble's title chain.

The District Court ordered this case tried on depositions with the parties introducing any and all evidence they deemed relevant. As the time for taking the trial depositions approached, National sought a ruling from the District Court on the burden of proof issue Noble raises here — i.e., whether Noble met his threshold burden and thereby placed National's title in issue. The District Court did not rule on that procedural issue, so out of caution National presented voluminous evidence of the validity of its ownership of the disputed tracts through the Amyx and Reid Patents.

Noble's repeated assertions to this Court, as well as to the courts below, that National abandoned and did not prove its title are simply untrue. National introduced hundreds of pages of title documents and hours of testimony from engineers and a title expert to prove its title. At the same time, National maintained such evidence was merely precautionary since its title would not be an issue unless Noble fully proved his own title, including the validity of the Totten Patents.

On his final day of rebuttal testimony, Noble introduced evidence of the so-called "Tevis Chain", a series of four deeds connecting neither to a patent from the Commonwealth nor to Noble. Although the area embraced by the deeds in the Tevis Chain included the disputed tracts, Noble proved no entry on or possession of the property by anyone claiming under the Tevis Chain.

When the evidence was complete, the District Court named as Special Master a highly regarded Eastern Kentucky lawyer well known for his expertise in Kentucky land disputes. The Special Master determined the Amyx and Reid Patents were the first (and therefore senior) patents issued for the land in dispute, rendering the Totten Patents and Noble's claims of title invalid. He further rejected the legal arguments and the interpretations of Kentucky law Noble presses before this Court. On a *de novo* review, the District Court made the same findings and reached similar conclusions. In a well-reasoned Opinion, the Sixth Circuit affirmed the decision below, specifically considering and expressly rejecting Noble's legal arguments.

REASONS FOR DENYING THE PETITION

I. This Case Involves Only Well-Settled Kentucky Property Law And Review Would Affect Only These Parties.

Supreme Court Rule 10.1 provides, "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." That Rule's list of types of special and important cases does not include a review of federal appellate decisions alleged to conflict with state law. By his Petition, Noble is requesting this Court to interpret numerous Kentucky state court opinions and to spend its time and resources elucidating esoteric

aspects of Kentucky property law that have been consistently decided by Kentucky's courts since at least 1847.

Noble does not claim the Court of Appeals was faced with a novel issue as yet undecided by Kentucky's own courts. Noble's complaint is that the Court of Appeals, and the District Court, and the Special Master, all misinterpreted and misapplied Kentucky law in rejecting his title claim.

Noble does not present this Court with any issue of national or public concern. He does not present an issue that is likely to reoccur in the federal courts or even in the Kentucky state courts. Were the Court to grant Noble's Petition, its decision would affect only these parties as the issues presented are narrow and limited to their facts. Of course, all issues are special and important to one who has lost below and is seeking yet another forum and another chance to prevail. However, Noble has had three tries before the District Court and three tries before the Court of Appeals. It is not incumbent upon this Court to provide Noble with yet another chance to press his state law property claims.

II. The Special Master, The District Court and The Court Of Appeals All Correctly Interpreted and Applied Kentucky Case Law In Rejecting Noble's Claim.

A. NOBLE NEVER MET HIS BURDEN OF PROOF.

Under Kentucky law, Noble has the burden of proving his title, and he may not rely on any infirmities in National's title to prove his claim. *Stewart Lumber Co.* v. *Fields*, 445 S.W. 2d 140 (Ky. 1969). The exception to this rule is when the defendant in a quiet title action requests affirmative relief and asks that title be quieted in him. In such a case, the issue becomes the superiority of titles, and not solely

the validity of the plaintiff's title. *McGiboney* v. *Newman*, 277 Ky. 835, 127 S.W. 2d 860 (Ky. 1939).

In its answers to all of Noble's complaints (there were four amendments sought), National has asserted superior title, but National has *not* requested that its title be quieted or otherwise sought any affirmative relief. Kentucky law provides one limited circumstance where a defendant's mere assertion of title is a request for affirmative relief. This limited circumstance is when both the plaintiff and the defendant claim through the same chain of title. *Id.* That is certainly not the situation in this case, and Noble's arguments based on this narrow circumstance are irrelevant.

B. THE TEVIS CHAIN DOES NOT AID NOBLE.

Noble places great reliance on the Tevis Chain, which began in 1845 without a grant from the Commonwealth and ended in 1890 with a judgment of title adverse to Tevis. As both the District Court and the Court of Appeals noted, it "started nowhere and ended nowhere".

Noble acknowledges that the many "presumptions" he claims arise from the existence of a 50-year old paper chain of title are based on the law of adverse possession. Because Noble has proved no possession by anyone under the Tevis Chain or under the Totten Patents these "presumptions" would not apply in this case. As Noble has not linked the Tevis Chain to his title, even if the presumptions did apply, they would only create one more title senior and superior to Noble's.

Kentucky's courts have specifically rejected Noble's position that a paper title chain, without actual adverse possession for the statutory period, can create a valid title. Kentucky's courts recognized that the rule Noble proposes would lead to chaos and require the record holder to "stand

guard" over the county property records to insure no one attempted to set up an adverse paper chain. *Flinn* v. *Blakeman*, 254 Ky. 416, S.W.2d 961 (Ky. 1934).

Until 1867, the Commonwealth was the true owner of all the area covered by the Totten Patents. By 1872, the owners by title from the Commonwealth were Amyx and Reid. Only actual adverse possession by Tevis and his predecessors or by Totten and his successors could defeat their title. Noble has shown no adverse possession by anyone, and his claim must fail.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JEFF A. WOODS
KAREN J. GREENWELL
WYATT, TARRANT & COMBS
250 West Main Street
Lexington, Kentucky 40507
(606) 233-2012

PAUL C. COMBS
COMBS & STEVENS
38 N. Lake Drive
P.O. Box 189
Prestonsburg, Kentucky 41653-0189
Counsel for Respondent